JURY SELECTION FOR DEATH PENALTY CASES CONFERENCE

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APAAC Training Room
Phoenix, Arizona

CASELAW REVIEW:
DEATH IMPAIRED JURORS
LIFE IMPAIRED JURORS
SCOPE OF QUESTIONING

Presented by:

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Distributed by:

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Capital Jury Selection: Case Law Review

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Roadmap

- Overview of case law relating to jury selection in capital cases
  - United States Supreme Court jurisprudence
  - Arizona Supreme Court jurisprudence
    - Scope/method of questioning
    - Juror strikes
- Recent developments in non death-penalty-specific issues

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Capital Jury Selection: Constitutional Requirements

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Witherspoon v. Illinois, 391 U.S. 510 (1968)

- Illinois statute provided: "it *shall* be … cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." *Id.* at 512 (emphasis added).
- At Witherspoon's trial, State used statute to eliminate all jurors who had reservations about capital punishment. *Id.* at 512-13.
- "[I]t is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." *Id.* at 518.
- "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." *Id.* at 522-23.

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Witherspoon v. Illinois, 391 U.S. 510 (1968)

Footnote 21: "We repeat … that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."

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Adams v. Texas, 448 U.S. 38 (1980)

- Texas statute stated: "A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." *Id.* at 42.
- Several jurors excused because they were unable or unwilling to take the oath.
- *Witherpoon* violation
  - Court interprets *Witherspoon* to establish that a juror may not be challenged for cause based on death-penalty views unless views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 45.
  - "[T]he State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths." *Id.* at 50.
  - Not clear that Adams' jurors were so "irrevocably opposed" to the death penalty that they could not serve. *Id.* at 50-51.

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Wainwright v. Witt, 469 U.S. 412 (1985)

- Court of appeals had drawn the standard for excluding juror from *Witherspoon* footnote 21. *Id.* at 416.
- The Supreme Court acknowledged confusion in the law, based on part on *Adams*, regarding when jurors may be excluded. *Id.* at 421.
- Court adopted *Adams* formulation: **The standard "is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."** *Id.* at 424 (quotations omitted).
- A juror's bias does not need to be shown with "unmistakable clarity" because these determinations "cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Id.*
- Recognizes the need to defer to the trial judge's assessment. *Id.* at 425-26.

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Morgan v. Illinois, 504 U.S. 719 (1992)

- Question presented: Whether a state may "refuse inquiry into whether a potential juror would automatically impose the death penalty upon conviction of the defendant." *Id.* at 721.
- "A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Id.* at 729.
- "[B]ased on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.*

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Summary of constitutional requirements

Jurors may be struck for cause based on death penalty views only if those views would prevent or substantially impair their jury service.

Court may not refuse inquiry into whether juror would automatically impose the death penalty, and a defendant may strike a juror for cause if pro-death views would prevent or substantially impair service.

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Voir dire: Method and Scope of Questioning

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Procedural rules

- Arizona Rule of Criminal Procedure 18.5
  - "The court must conduct a thorough oral examination of the prospective jurors and control the voir dire examination. Upon request, the court must allow the parties a reasonable time, with other reasonable limitations, to conduct a further oral examination of the prospective jurors. However, the court may limit or terminate the parties' voir dire on grounds of abuse. Nothing in this rule precludes submitting written questionnaires to the prospective jurors or examining individual prospective jurors outside the presence of other prospective jurors." Ariz. R. Crim. P. 18.5(d).
  - "Questioning must be limited to inquiries designed to elicit information relevant to asserting a possible challenge for cause or enabling a party to intelligently exercise the party's peremptory challenges." Ariz. R. Crim. P. 18.5(e).

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Questionnaires

- Whether to use one and what to include is discretionary under Ariz. R. Crim. P. 18.4(d).
  - Parties have no right to questionnaire. *State v. Naranjo*, 234 Ariz. 233, 241, ¶ 23 (2014).
  - Not error to deny use of questionnaire (so long as oral voir dire is permitted).
  - *E.g. State v. Moore*, 222 Ariz. 1, 9-10, ¶¶ 33-36 (2008).
- Almost always used in capital cases.
- Useful to obtain sensitive or confidential information, and to prescreen for hardship.

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Questionnaires (continued)

- Court may not strike jurors based only on death-penalty views as stated in questionnaire if defense requests rehabilitation.
- *State v. Anderson (I)*, 197 Ariz. 314 (2000)
  - Facts
    - Questionnaire given; three jurors stated that they were opposed to the death penalty on moral or religious grounds and could not set those beliefs aside. *Id.* at 318, ¶¶ 4-5.
    - Court denied defendant's request to rehabilitate jurors and struck them over defense counsel's objection. *Id.*
  - Jurors could have been rehabilitated under *Witherspoon*. *Id.* at 318-20, ¶¶ 6-12.
  - Trial court lacks discretion under Rule 18.5(d) to refuse oral questioning if a party requests it. *Id.* at 320-21, ¶¶ 13-16.
  - Structural error; automatic reversal. *Id.* at 321-23, ¶¶ 17-24.

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Questionnaires (ctd.)

- *Anderson I* has since been limited to its specific facts; no structural error if:
  - Defense stipulates to strikes. *State v. Medina*, 232 Ariz. 391, 402, ¶¶ 29-31 (2013); *see also Anderson*, 172 Ariz. at 324, ¶ 24.
  - Trial court does not *sua sponte* strike jurors based on answers to oral *voir dire*. *State v. Bush*, 244 Ariz. 575, 586, ¶¶ 38-40 (2018).
  - The questionnaire is not as detailed as defense would like, but oral *voir dire* is permitted. *Naranjo*, 234 Ariz. at 241, ¶¶ 22-27; *State v. Ellison*, 213 Ariz. 116, 137, ¶¶ 86-87 (2006).
  - Trial court omits the *Morgan* question from the questionnaire but permits it to be asked orally. *State v. Parker*, 231 Ariz. 391, 399-400, ¶¶ 19-21 (2013).
  - Trial court prematurely dismisses juror based on questionnaire, but then allows defense to question juror telephonically to confirm views. *State v. Payne*, 233 Ariz. 484, 498, ¶¶ 16-18 (2013).

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Questionnaires (continued)

- Be careful what you include
- *Bush*, 244 Ariz. at 583, ¶ 19, Question 27:

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Questionnaires (continued)

"If you agree the death penalty may be appropriate in some cases, please rank the following reasons from 1 to 4, 1 being most important, that would cause you to favor the death penalty.

____To deter others from committing murder.
____For economic reasons. It is expensive to house prisoners for the remainder of their lives.
____Because an eye for an eye, is fair.
____To protect the public against defendants who might get out of jail in the future.
____Other (please specify) _____."

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Questionnaires (continued)

- No abuse of discretion in including question 27. *Bush*, 244 Ariz. at 583-84, ¶¶ 20-28.
- Court rejects defense argument that question 27 injected non-statutory aggravation.
- Jury was instructed not to consider the factors listed in the question.
- "Nonetheless, we see little purpose for, and a potential risk of confusion and possible prejudice created by, a question such as question 27. We therefore disapprove of its future use in capital case pretrial juror questionnaires."

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Individual voir dire

- Discretionary with the court; defendant is not entitled to it. *Bush*, 244 Ariz. at 584-85, ¶¶ 29-33.
- *Morgan* does not require it. *Id.*
- Justifications for it can be addressed by questionnaire. *Id.* (citing *State v. Bible*, 175 Ariz. 549, 570 (1993) (noting that questionnaire addressed subject matter that ordinarily could militate in favor of individual *voir dire*)).
- *See also State v. Lynch (I)*, 225 Ariz. 27, 34, ¶¶ 22-24 (2010).

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Order of questioning

- *State v. Garza*, 216 Ariz. 56, 63, ¶¶ 19-21 (2007)
  - Trial court allowed prosecutor to speak first in questioning each panel; defense argued that this communicated that the State had special authority in court.
  - Rule 18.5(d) does not specify an order.
  - "Traditionally, prosecutors speak to the panel first during voir dire because the state has the burden of proof and presents its case first during trial."
  - No error in following this procedure.

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Scope

- May not preview trial evidence: *Bush*, 244 Ariz. at 585-86, ¶¶ 34-37.
  - Facts:
    - Home invasion and double murder of 9-year-old child and her father; attempted murder of mother.
    - State's evidence included graphic and lengthy 911 call by mother, which captures her engaging in a gun fight with the home invaders, discussing family being killed, and experiencing physical pain from her gunshot wounds.
  - Defense asked to play 911 call and show photographs of victims during *voir dire* to determine whether jurors would be substantially impaired at sentencing based on this evidence.

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Scope (continued)

- "Voir dire is not meant to allow a defendant to ask a juror to speculate or precommit on how that juror might vote based on any particular facts." *Id.* (quotations omitted).
- "Nor must a trial court allow a defendant to ask questions designed to condition the jurors to damaging evidence expected to be presented at trial and to commit them to certain positions prior to receiving the evidence." *Id.* (quotations omitted).
- Questioning was sufficient to alert jurors about graphic evidence; therefore "exposing them to the 911 tape and photographs would have unnecessarily risked conditioning the jurors to the State's damaging evidence." *Id.*

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Scope (continued)

- Specific mitigation and meaning of "sufficiently substantial to call for leniency": *State v. Glassel*, 211 Ariz. 33, 45-47, ¶¶ 32-44 (2005)
  - Defendant sought to ask jurors about their definition of the statutory language "sufficiently substantial to call for leniency."
  - Court found proposed questioning improper
    - Questioning did not further *Morgan* inquiry because it did not address life-impairment, and phrase is "inherently subjective and not the equivalent of a mathematical formula."
    - Jury must exercise subjective judgment in weighing aggravation and mitigation.
  - Defendant also sought to ask jurors what weight they would assign his proffered mitigation, and to ask open-ended questions about what kind of mitigation they would consider important.
    - Not required by *Morgan*.
    - Trial court complied with *Morgan* through jury questionnaire and oral voir dire, which addressed predispositions on capital punishment.

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Scope (continued)

- Specific mitigation: *State v. Johnson*, 212 Ariz. 425, 434-35, ¶¶ 29-35 (2006)
  - Defendant unsuccessfully moved to strike panel for cause because trial court would not permit questioning on whether jurors regarded specific factors (e.g. substance abuse, difficult childhood, psychological problems) as mitigating.
  - Defendant argued on appeal that limitations violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (requiring sentence to consider all relevant mitigation) and *Morgan*.

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Scope (continued)

- *Johnson* (continued)
  - Arizona Supreme Court affirms trial court.
  - Cites authority from other jurisdictions supporting refusal to voir dire on specific mitigation because:
    - Questioning commits jurors to accepting or rejecting specific mitigator before evidence is heard.
    - Allows defendant to fish for jurors who might be more receptive to the mitigation he plans to offer, under the guise of uncovering bias.
  - No *Eddings* violation because *Eddings* does not deal with *voir dire*: "In fact, allowing such a procedure could encourage jurors to limit their evaluation of mitigation evidence to only those factors enumerated rather than to make a broader inquiry into all the evidence presented. Such a result would be contrary to the policy behind *Eddings* …."
  - *Morgan* likewise does not require questioning on specific mitigation; trial court complied with *Morgan* through questionnaire and individual *voir dire* and dismissed impaired jurors.

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Scope (continued)

- Specific mitigation: *State v. Patterson*, 230 Ariz. 270, 273-74, ¶¶ 6-9 (2012)
  - Trial court sustained State's objection to asking juror what kind of circumstances the juror would find to be mitigating.
  - No abuse of discretion in refusing this question under *Glassel* and *Johnson*.
  - Refusing question did not limit *voir dire* because defense was permitted to fully probe beliefs, biases, views, and prejudices regarding death penalty, and their general views on aggravation and mitigation.
  - Defendant was permitted to ask what "mitigation means to [each] juror" and "whether the juror can imagine a situation where the totality of a defendant's character, including things he has endured or accomplished, could warrant mercy despite his crimes"—these questions are ok.

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Scope (continued)

- Specific mitigation: *Naranjo*, 234 Ariz. at 241, ¶ 22 & n.2.
  - Court refused to include several defense-requested questions in questionnaire
  - Question 54:

    Could you consider mental health-related issues of a defendant convicted of first degree murder as mitigation?
  - Arizona Supreme Court noted that questions like this are inappropriate, either in the questionnaire or on oral *voir dire*, under *Glassel*.

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Scope (continued)

- Specific aggravation: *State v. Smith*, 215 Ariz. 221, 230-32, ¶¶ 36-43 (2007)
  - Defendant wanted to ask jurors whether they would automatically impose death if they found specific aggravators.
    - This question sought to commit the jurors to specific positions before evidence was received.
    - "*Morgan* was not meant to allow a defendant to ask a juror to speculate or precommit on how that juror might vote based on any particular facts." (quotations omitted).
  - In addition, Defendant not only asked jurors about the meaning of "sufficiently substantial to call for leniency" but also improperly asked them to opine about what it would take to meet the standard.
  - And the trial court "did not abuse its discretion in refusing to allow Smith's open-ended questions about the best reason for having or not having the death penalty, the importance of considering mitigation, and the type of offense for which the juror would consider death to be appropriate, because "[e]ach of these questions was quite broad and went well beyond the constitutionally required determination of whether the juror would consider mitigation."

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Scope (continued)

- Facts of case: *State v. Burns*, 237 Ariz. 1, 12-13, ¶¶ 19-21 (2015)
  - Trial court precluded defense from asking jurors whether they would consider a life sentence if a defendant were convicted not only of murder, but also of kidnapping and sexual assault.
  - Trial court did not abuse its discretion by precluding this question:
    - No *Morgan* violation.
    - Defendant was entitled to determine whether jurors would automatically vote for death, but not whether they would "impose the death penalty based on the specific facts of his case."

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Scope (continued)

- Facts of case/specific aggravation: *State v. Prince*, 226 Ariz. 516, 529, ¶¶ 32-35 (2011)
  - Juror stated in questionnaire for resentencing trial that she opposed the death penalty in cases other than those involving children and "well-thought-out crimes."
  - Prosecutor probed definition of "well-thought-out crime":

    Q: "[T]his is a case where the defendant has been found guilty, having an argument with his wife, shooting his stepdaughter and killing her and then shooting the wife. Would that be your definition of a well-thought-out-crime?"

    A: That was an argument?

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Scope (continued)

Q: They were arguing first for a lengthy period of time. Then he had a gun.

A: No.

Q: What would you mean by that when you said a well-thought-out crime?

A: Well, something that was done, thought out for months in advance, something that when the time was right.

Q: So there's really advance planning?

A: Yes.

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Scope (continued)

- On appeal, defense argued that the prosecutor had asked stakeout questions.
- "Stakeout questions ask a juror to speculate or precommit to how that juror might vote based on any particular facts." (quotations omitted)
- "Here, the prosecutor merely sought to determine whether Prince's murder fit the juror's definition of a 'well-thought-out crime,' and thus determine whether that juror could consider the death penalty. That questioning did not seek to precommit the juror to a specific result." *Id.*

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Juror strikes

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Procedural rules

(a) Challenge to the Panel. Any party may challenge the panel on the ground that its selection involved a material departure from the requirements of law. Challenges to the panel on this ground must be in writing, specify the factual basis for the challenge, and make a showing of prejudice to the party. A party must make, and the court must decide, a challenge to a panel before the examination of any individual prospective juror.

(b) Challenge for Cause. On motion or on its own, the court must excuse a prospective juror or jurors from service in the case if there is a reasonable ground to believe that the juror or jurors cannot render a fair and impartial verdict. A challenge for cause may be made at any time, but the court may deny a challenge if the party was not diligent in making it.

Ariz. R. Crim. P. 18.4

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Strikes for cause: *Witherspoon*

- Determination whether jurors' opposition to death penalty prevents or substantially impairs jury service is inherently discretionary; appellate court gives heightened deference to trial court's assessment.
- Factors to consider
  - Substance of jurors answers
  - Demeanor
  - Body language
  - Tone of voice
  - Eye contact
  - Visible emotion
  - Other factors bearing on credibility (e.g. inconsistent answers, etc.)

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Strikes for cause: *Witherspoon* (continued)

- Appellate tips
  - Make as detailed a record as possible in moving to strike, describing all intangible factors and reasons for the motion that would not otherwise be apparent from the record.
  - Encourage judges to make as detailed a ruling as possible on such factors.

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Strikes for cause: *Witherspoon* (continued)

- "A juror's bias need not be proved with unmistakable clarity." *State v. Anderson (II)*, 210 Ariz. 327, 338, ¶ 26 (2005).
- *E.g. State v. Boyston*, 231 Ariz. 539, 548-49, ¶¶ 39-43 (2013)
  - Juror 51
    - Questionnaire: stated she generally opposed death penalty and considered it morally difficult to be part of the process, but avowed that she was "not strongly opinionated about it" and could consider the evidence and follow the law.
    - Oral *voir dire*: stated that she was strongly tied to Catholic Church, which opposes death penalty, and that it would be a "big struggle" to set aside religious beliefs.
    - Struck for cause.
  - Arizona Supreme Court affirmed
    - Juror indicated that she could set aside religious beliefs, but judge must consider totality of answers
    - Totality here showed that the juror "was highly conflicted about imposing the death penalty."
    - No abuse of discretion

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Strikes for cause: *Witherspoon* (continued)

- *E.g. Burns*, 237 Ariz. at 13, ¶¶ 24-28.
  - Juror 68
    - Had "mixed feelings" about death penalty and felt a life sentence was bad enough; suggested religious beliefs would interfere, but said she could vote for death in the proper case.
    - Struck juror for cause.
    - No abuse of discretion because the record provided an adequate basis to determine that her performance was substantially impaired.
  - Juror 186: could not impose the death penalty unless defendant had a violent past; no abuse of discretion in striking because "[a] juror does not have to object to the death penalty in every conceivable case to be excluded for cause."

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Strikes for cause: *Witherspoon* (continued)

- *Burns* (ctd.)
  - Juror 198
    - Revealed in juror questionnaire that she feared death, could not vote for a death sentence, and could not look at death photos.
    - When asked whether fear of death might interfere with imposing death penalty, replied, "I don't know. It depends how I felt after I've seen all of the evidence."
    - Arizona Supreme Court affirmed strike for cause because juror could not say whether she could follow the law notwithstanding fear of death.

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Strikes for cause: *Witherspoon* (continued)

- *E.g., Ellison*, 213 Ariz. at 137-38, ¶¶ 88-91: juror properly struck even though she promised to uphold oath, where she could not definitively say whether her beliefs would cause her to ignore the law.
- *E.g., Patterson*, 230 Ariz. at 274-75, ¶¶ 14-18
  - Juror employed by Maricopa County Public Defender's Office.
  - At first expressed strong opposition to death penalty, but then said she could be fair and impartial and would be able to sentence someone to death.
  - Trial court correctly granted motion to strike based on jurors' contrary answers.
  - "Even if a juror is sincere in his promises to uphold the law," a judge may still find the juror impaired by his personal views (quotations omitted).

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Strikes for cause: *Witherspoon* (continued)

- *E.g. Prince*, 226 Ariz. at 528-29
  - Juror 18
    - Indicated in questionnaire that death penalty should be used more often but said on *voir dire* that he did not believe a person has the right to put another person to death.
    - "I'm still wavering on it right now. It's tearing me apart."
    - Claimed he could not sentence anyone to death except a terrorist, but also said that he could follow instructions.
    - Arizona Supreme Court finds no error in granting motion to strike because juror expressed "clear reservations" about death penalty.
  - Two other jurors who professed it would be hard to impose death were also properly struck based on equivocation.

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Strikes for cause: *Witherspoon* (continued)

- *E.g. Naranjo*, 234 Ariz. at 239-40, ¶¶ 12-20
  - Trial court granted motion to strike juror who stated she could impose the death penalty but expressed reservations about hearing evidence of fetal homicide.
  - Court made specific findings as to juror's demeanor:

    The Court's had an opportunity to view her demeanor during jury selection, listen to her answers. Her demeanor is her head was down, she's very, very emotional. The Court views her answers as confusing, at best, and it was hard for her to articulate.
  - Arizona Supreme Court found no abuse of discretion, relying heavily on trial court's credibility findings and assessment of demeanor.

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Strikes for cause: *Witherspoon* (continued)

- Additional examples
  - *State v. Hulsey*, 243 Ariz. 367, 379-80, ¶¶ 32-36 (2018);
  - *State v. Payne*, 223 Ariz. 484, 497-99, ¶¶ 13-22 (2013);
  - *Lynch I*, 225 Ariz. at 34-35, ¶ ¶ 25-28;
  - *Moore*, 222 Ariz. at 10-11, ¶¶ 37-44;
  - *State v. Speer*, 221 Ariz. 449, 454-56, ¶¶ 23-29 (2009);
  - *State v. Roseberry*, 210 Ariz. 360, 366-68, ¶¶ 26-44(2005).

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Strikes for cause: *Morgan*

- Be prepared to respond to defense motions to strike based on alleged death bias.
- Rehabilitate jurors by showing that they can set aside personal preference for death, consider a life sentence, and follow all instructions.
- Again, heavy deference to trial court in this context.
- Make sure record is complete and detailed on intangible factors.

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Strikes for cause: *Morgan* (continued)

- *E.g. State v. Acuna Valenzuela*, 245 Ariz. 197, ___, 426 P.3d 1176, 1187-89, ¶¶ 20-30 (2018)
  - *Morgan* motions denied on four jurors
    - Juror 23: started process leaning toward death penalty but after questioning said he needed to hear mitigation and would keep an open mind.
    - Juror 100: stated would consider both life and death and follow instructions.
    - Juror 122: initially inclined to impose death but after hearing explanation of trial wanted to hear all evidence.
    - Juror 140: initially believed in automatic death penalty but ultimately stated could impose life sentence.
  - Arizona Supreme Court concluded that all jurors had been rehabilitated and trial court did not abuse its discretion by denying motions to strike.
- *E.g. State v. Velazquez*, 216 Ariz. 300, 306-07, ¶¶ 17-20 (2007) (no abuse of discretion in denying motion to strike juror who stated he "could not see" a circumstance in which death penalty is inappropriate if defendant intended to kill, was glad he killed and had no defense, because these "remarks did not indicate that the juror would invariably impose a death sentence in the context of this case, and defense counsel made no attempt to further elucidate the juror's views").

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Strikes for cause: *Morgan* (continued)

- *E.g. Payne*, 223 Ariz. at 499, ¶ 23: no error in failing to strike jurors who expressed pro-death penalty views in questionnaire where, upon questioning, each stated that he or she would disregard personal feelings, would follow the law, and would not impose death if it were not appropriate.
- *E.g. Speer*, 221 Ariz. 449, 455-56, ¶¶ 23-29
  - Juror 29 stated in questionnaire that death penalty should be imposed in all premeditation cases.
  - Also stated in questionnaire, "when I was younger, I felt an eye for an eye," but now he wishes "to know why before [he] decide[s]."
  - During oral voir dire, stated he might not impose death if a person had a bad upbringing or mental-health issues and stated, "I need to hear everything before I decide."
  - No abuse of discretion in denying this motion to strike given juror's statements in court.

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Recent developments

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Batson v. Kentucky, 476 U.S. 79 (1986)

- Three-part test
  - Defendant establishes *prima facie* case of purposeful racial discrimination.
  - Burden shifts to State to show race-neutral reason for strikes.
  - Trial court determines whether there was purposeful racial discrimination.
- *State v. Urrea*, 244 Ariz. 443 (2018): remedy for *Batson* violation
  - After finding *Batson* violation, trial court restored three struck jurors and forfeited three of State's peremptory strikes.
  - Arizona Supreme Court approved this remedy, but specifically did "not adopt a bright-line rule that trial courts must follow in fashioning *Batson* remedies."
  - Remedy for *Batson* violation therefore remains discretionary with trial judge.

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Jurors with felony convictions

- *Sanders*, 245 Ariz. at ___, 425 P.3d at 1067-68, ¶¶ 33-38.
  - Juror disclosed criminal conviction and stated during voir dire his rights had been restored; however, evidence later emerged that he had applied to restore his gun rights while the trial was ongoing.
  - Any error was not structural, in part because defendant has no constitutional right to a jury composed of non-felons.
  - No error because juror's right to serve as a juror was automatically discharged upon discharge from probation and payment of fines and restitution, *see* A.R.S. § 13-912(A), but his gun rights were not, *see* A.R.S. § 13-912(B).
- *See also Prince*, 226 Ariz. at 529-30, ¶¶ 36-40 (no abuse if discretion in striking juror with out-of-state felony conviction).

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A.R.S. § 21-211

The following persons shall be disqualified to serve as jurors in any particular action:

1. Witnesses in the action.
2. Persons interested directly or indirectly in the matter under investigation.
3. Persons related by consanguinity or affinity within the fourth degree to either of the parties to the action or proceedings.
4. Persons biased or prejudiced in favor of or against either of the parties.

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A.R.S. § 21-211 (continued)

- *State v. Eddington*, 228 Ariz. 361, 365, ¶ 18 (2011) (holding that "a peace officer currently employed by the law enforcement agency that investigated the case is an 'interested person' who is disqualified from sitting as a juror" under A.R.S. § 21-211(2)).
- *Acuna-Valenzuela*, 245 Ariz. at __, 426 P.3d at 1189-90, ¶¶ 31-32 (rejecting argument that juror who was close friends with prosecutor in same county attorney's office that was prosecuting the case at issue should have been disqualified under A.R.S. § 21-211(2) or (4)).
- *State v. Escalante-Orozco*, 241 Ariz. 254, 272-73, ¶¶ 39-43 (2017) (no error under A.R.S. § 21-211 or *Eddington* in not disqualifying juror who was employee of medical examiner's office).
- *State v. Lynch (II)*, 238 Ariz. 84, 104-05, ¶¶ 71-75 (2015) (court not required to disqualify juror who had previously worked with testifying expert).

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Juror misconduct

- Should be raised timely in a motion for a new trial under Rule 24.1.
- Generally evidence of juror's deliberative process is inadmissible
  - *See* Ariz. R. Crim. P. 24.1(c)(3) (setting forth grounds for new trial based on juror misconduct).
  - *See* Ariz. R. Crim. P. 24.1(d) ("If a verdict's validity is challenged under (c)(3), the court may receive the testimony or affidavit of any witness, including members of the jury, that relates to the conduct of a juror, a court official, or a third person. But the court may not receive testimony or an affidavit that relates to the subjective motives or mental processes leading a juror to agree or disagree with the verdict.").
  - Exception: *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) ("[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.").
  - *E.g. Acuna Valenzuela*, 245 Ariz. __, 426 P.3d at 1193-95, ¶¶ 51-64 (juror's blog post containing impressions of trial did not reflect intentional concealment of bias and was otherwise inadmissible to impeach verdict).

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The End.

Questions? Call or email.

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